

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

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UNITED STATES OF AMERICA : :  
 : :  
-vs- : Case No. 1:09-cr-179  
 : :  
MIRWAIS MOHAMADI, : :  
Defendant. : :  
-----: :

MOTIONS HEARING

May 8, 2009

Before: Liam O'Grady, Judge

APPEARANCES:

Ronald L. Walutes, Jr., and Stephanie B. Hammerstrom,  
Counsel for the United States

Kevin Brehm, Counsel for the Defendant

The Defendant, M. Mohamadi, in person

1 THE CLERK: Criminal case number 1:09-cr-179, the  
2 United States of America versus Mirwais Mohamadi. Counsel  
3 please identify themselves for the record.

4 MR. WALUTES: Good morning, Your Honor. Ronald  
5 Walutes for the United States, joined by Stephanie  
6 Hammerstrom.

7 THE COURT: All right. Good morning.

8 MR. BREHM: Good morning, Your Honor. Kevin Brehm  
9 on behalf of Mr. Mohamadi. He is present in court today in  
10 the Marshal's custody.

11 Your Honor, I believe the purpose today is on our  
12 motion asking to change and modify some of the conditions he  
13 is being held under as a pretrial detainee.

14 THE COURT: Yes, sir.

15 MR. BREHM: We tried to in some respects kind of  
16 streamline the issue in our response to really try to focus on  
17 what are the key concerns that we have raised. The first  
18 primary concern is the issue about contact with the family.

19 Then in addition to that, there are some concerns  
20 about some of the restrictions in the institution where he  
21 would normally, if considered a regular inmate, have certain  
22 programs he could attend and other rights. And those are  
23 being taken away, and that is the second issue we want to  
24 address.

25 We have proposed to the Court a possible order that

1 would address these issues. The biggest concern we have at  
2 this point is he has been in federal custody although he is  
3 placed in a state or regional institution, but he is a federal  
4 detainee.

5 We understand the Government is saying, well, but he  
6 is also a sentenced state prisoner, but our concern is that  
7 that in some respects is not a real factor because even in the  
8 state system if he was to go to one of the Virginia state  
9 prisons, he is going to start off with the rights that we are  
10 asking for even as a state-sentenced prisoner. And those  
11 rights would only be taken away if he is has some conduct in  
12 the institution where he is sent that would allow them through  
13 disciplinary procedures to take away that these rights.

14 THE COURT: Well, what do you want that he doesn't--  
15 I mean, he is a state prisoner. He has demonstrated, at least  
16 to this stage with the evidence that I have looked at, that he  
17 will use anyone and anything at his disposal to try and avoid  
18 a successful prosecution for the charges against him, and that  
19 in part has led to more charges against him. And he has  
20 demonstrated that he really deserves absolutely nothing more  
21 than the minimal constitutional requirements while he is a  
22 state prisoner in the custody of the federal system.

23 So, tell me what you don't have and that you believe  
24 is a constitutional deprivation because I don't think that Mr.  
25 Mohamadi deserves any more than, frankly, he has right now.

1 MR. BREHM: Well, I think what's first most obvious  
2 is that he is being denied any contact with the family.

3 THE COURT: Well, he is using his family to further  
4 criminal behavior. How do you propose allowing family contact  
5 and not further his criminal behavior?

6 MR BREHM: Well, our contention is he has not used  
7 the family to further--

8 THE COURT: Well, they have got calls to the sister  
9 urging her to falsify documents.

10 MR. BREHM: Well, first of all, we contest the  
11 accuracy of that allegation. But more importantly for  
12 purposes of the restrictions on contact with family, that has  
13 absolutely nothing to do with any of the allegations in the  
14 indictment as to trying to affect the prosecution.

15 THE COURT: Doesn't the institution have a right to  
16 prevent future crimes as well and other crimes?

17 MR. BREHM: Well, Your Honor, as we made fairly  
18 clear, we don't in any way suggest that the contact with the  
19 family would be unsupervised. We know and we would anticipate  
20 that it would be extremely carefully monitored, supervised.  
21 Correspondence from him to family and from them to him would  
22 be reviewed before it was allowed to go in and out. Phone  
23 calls are going to be recorded, they are going to be  
24 monitored.

25 The Court could certainly, as we suggest, require,

1 it wouldn't be unusual, that verbal communications be only in  
2 English and not any other foreign language. So, that's easy  
3 for the Court to establish.

4 And as far as visits, if there are personal visits,  
5 they are normally regulated anyway for almost any inmate.

6 And so, there are certainly means that they could  
7 have-- There would be no contact visits and there could be  
8 means to supervise the visits.

9 So, what we are simply suggesting is as to the  
10 immediate family, we are not talking about anyone beyond that,  
11 he should be able to have these basic rights of contact that  
12 we understand will be heavily supervised and monitored, but he  
13 still should have those.

14 And what I think is somewhat ironic, apparently even  
15 in the Northern Neck Regional Jail's inmate manual, I would  
16 proffer they have certain classifications for their special  
17 housing, one of them is administrative segregation, and that's  
18 usually to be applied to individuals who might be deemed  
19 dangerous or charged with very serious crimes. Even under  
20 their procedures at Northern Neck, in administrative  
21 segregation you still have the substantial rights including  
22 the family contact rights.

23 And then there is a more elevated form of housing  
24 which is called punitive detention, and that's when someone  
25 actually has committed some violation in the institution and

1 there has been some kind of process for determining that that  
2 violation occurred. And even in Northern Neck's own manual  
3 and their procedures, even if you are elevated to punitive  
4 detention, you are still at least allowed correspondence to go  
5 in and out.

6 So, what we have got here is going even beyond that,  
7 an extreme of total prohibition of family contact. That's  
8 something that even I think in cases like the Moussaoui case  
9 there was some provisions for family contact. We are just  
10 going well beyond what this case would justify.

11 And again, our request is very, in some respects  
12 very narrow and limited. We are asking for family contact  
13 with immediate family which could be very strictly monitored  
14 and supervised, and we don't in any way dispute that.

15 And then in addition to that, we are just simply  
16 asking that, not necessarily that the administrative  
17 segregation, not that all those conditions be removed, but  
18 that he at least get some of the basic rights that people in  
19 administrative segregation get. That's going to include the  
20 ability to participate in religious programs like church or  
21 Bible studies. Some time out of the cell for recreation,  
22 basic recreation, even though that might be limited to his not  
23 being able to interact with other inmates, he would still have  
24 a chance to be out of his cell for a certain number of hours  
25 per day and per week.

1           THE COURT: And the jail doesn't disagree with you  
2 there, they say he is going to get that, right?

3           MR. BREHM: Well, no, that's the problem. They have  
4 had said on the one hand, the Marshals seem to acknowledge--  
5 And again, it is the Marshals that are putting the  
6 restrictions on. Again, this is beyond what the jail would  
7 normally do for their own inmates, that's one of the points we  
8 are making. And what the Marshals have said is, well, he has  
9 a right to a certain amount of rec time, but apparently, and I  
10 would proffer he is still not getting even that, even though  
11 that is even less than what Northern Neck would normally  
12 provide.

13           So, we are simply asking for lifting some of these  
14 restrictions that are still in no way going to impact the risk  
15 to the security of the institution, to the security of others.  
16 Again, we are not asking him to be treated like an inmate in  
17 general population. We are trying to be reasonable in our  
18 request to narrowly focus it to what would seem to me to be  
19 more nonpunitive. Because one of the concerns is at this  
20 point, especially as a pretrial detainee not being convicted  
21 on this case, and certainly we are challenging these  
22 allegations and we will be going to trial to fight these  
23 allegations, in a sense by adding restrictions on to him that  
24 Northern Neck would normally not impose, simply has to be  
25 punitive. Because Northern Neck, they would have their own

1 restrictions for administrative and security purposes, and  
2 this goes well beyond that. So, it has to be punitive.

3 And then for the Government to say, well, here are  
4 two Second Circuit cases from years ago that say a  
5 state-sentenced prisoner isn't to be given the rights of a  
6 pretrial detainee, first of all, I don't know that applies in  
7 this situation because those cases had nothing to do with this  
8 situation. One case was a 1983 action where well after the  
9 period of incarceration the inmate was bringing a lawsuit and  
10 there was a summary judgment issue.

11 And the other one was a Fourth Amendment issue where  
12 inmates had been convicted of a federal crime and said, our  
13 conversations were recorded. And the Court there said, the  
14 Willoughby case that the Government cites, the Court there  
15 said it doesn't really matter whether you are a pretrial  
16 detainee or a sentenced prisoner, you don't have a privacy  
17 right in an institution to your conversations with other  
18 inmates.

19 So, those cases don't apply here. The point is,  
20 even as a state prisoner, he is entitled to these rights.

21 THE COURT: I understand.

22 MR. BREHM: That's what we are asking for.

23 THE COURT: Okay, let me hear from the Government.

24 MR. WALUTES: Your Honor, there is also an Eighth  
25 Circuit case I neglected to include in my reply that is cited



1 within the Second Circuit case.

2 In the Second Circuit case, first off, there is an  
3 institutional knowledge. When a person harms a staff member  
4 or commits a violation, they moved him from the Southern  
5 District of New York Metropolitan Regional Jail, which is  
6 federal, to a more enhanced security institution. He didn't  
7 get to start over in that new institution. He was placed in  
8 very severe restrictions in the Second Circuit case.

9 They say that if he is serving a state sentence, he  
10 is a convicted prisoner. And then that leaves him with only  
11 two constitutional concerns, Your Honor, that I would  
12 articulate at this point. One is the Sixth Amendment right to  
13 counsel, which the parties are in agreement there is no  
14 barrier to.

15 The second is an Eighth Amendment right relating to  
16 unreasonable punishment. Your Honor, here there is nothing  
17 being done other than attempting to freeze the status quo  
18 until we can try this case next month. The Government resents  
19 the reference to Moussaoui. Moussaoui was trying to plead  
20 guilty. He was not in any fashion doing anything to harm a  
21 witness.

22 This defendant has done everything under his power  
23 to kill a witness before his trial and avoid trial. If he is  
24 convicted on these charges, he is very likely to spend the  
25 rest of his life in jail.

1           Bell, which the Government doesn't believe applies,  
2 but even if we for sake of argument use Bell, Bell says that  
3 federal prisoners who are detained-- And I would note,  
4 defense counsel attached last night the Court's detention  
5 order. The Court explicitly found, there is reason, that  
6 there is a serious risk this defendant will endanger the  
7 safety of another person or the community.

8           The statute has added that language because the  
9 federal courts recognize that that was a very serious category  
10 of case. And this defendant under this indictment squarely  
11 fits within it.

12           Your Honor, I would note monitoring is absolutely  
13 useless. And the best example of that-- Even monitoring of  
14 English language communications. Yesterday I sat at my desk  
15 and I read the defense counsel's motion that is docketed in  
16 June on venue. He attached the identity of the second victim  
17 in this case, which to the date had not yet attempted to be  
18 killed. As an attachment, he puts the victim's vehicle, the  
19 make, model, year, color and tag number.

20           Now, I wonder if the defense counsel knew when he  
21 put that on the Internet whether or not she is currently using  
22 that vehicle. The truth is she is not. But, Your Honor, I  
23 monitored that conversation, but I could not stop the passage  
24 of that very risky information now onto the public domain.  
25 Monitoring does not protect the Government's concerns.

1           The defendant must prove that the restrictions are  
2 arbitrary and capricious. Your Honor, he cannot. Under this  
3 indictment, probable cause having already been made, the  
4 restrictions on this defendant are reasonable and appropriate.

5           His family has attempted to alter public documents.  
6 They have flagged witnesses going before the federal grand  
7 jury. He is a registered gangster in the jails in Virginia.  
8 And he is referring to people he is calling who are out in the  
9 community and still out in the community today. One of his  
10 friends is currently incarcerated for murder, but the others  
11 are all there, Your Honor, and he tells them, keep it  
12 gangster.

13           Your Honor, that is the concern. We cannot realtime  
14 and the jail should not be asked realtime to monitor this  
15 defendant's communications. And his family has proved, even  
16 his mother, even his sister, their willingness to do as  
17 instructed at his wishes.

18           Your Honor, we believe the defendant's motion, and  
19 it is his burden, fails.

20           THE COURT: So, after conferring with the jail, you  
21 still don't believe the family visits under any circumstances  
22 would be secure?

23           MR. WALUTES: I do not, Your Honor. I will tell the  
24 Court that I brought today Investigator Burnham with some  
25 thirty-plus years of law enforcement experience who is the one

1 who first spotted the defendant's prostitution activities  
2 within the jail, and that caused the monitoring to elevate on  
3 this defendant, and subsequently identified the attempts to  
4 kill witnesses and other very severe obstruction of federal  
5 grand jury proceedings.

6 The problem, Your Honor, with putting witnesses on  
7 the stand, and that's why I hesitate to do it, is all it does  
8 is, frankly, educate this defendant as to how he was caught  
9 and allows him then to circumvent it.

10 I will also inform the Court that I asked the  
11 Marshals to have Major Hall available should the Court wish.  
12 He is not available until 10. I asked that he still come in  
13 case the Court had concerns.

14 But, Your Honor, I do not believe given the history  
15 of this defendant-- It is not a situation where we don't know  
16 the family and we could presume them to act in appropriate  
17 behavior. Your Honor, here-- And this is another point I  
18 should articulate, Your Honor. We don't know who his mother  
19 three-wayed him to when he should have been talking to a  
20 lawyer. Alexandria does not record the attorney lines.  
21 Fairfax does. And we will come later to the Court for an  
22 order seeking those telephone calls, but we'll defer that to  
23 another day. Alexandria doesn't record them.

24 The only thing we know is that on recorded calls  
25 after Alexandria caught him using the attorney line

1 inappropriately, he tells his mother to change her number  
2 because it's now blocked. She is three-waying him. We don't  
3 know to who and we don't know what was said on that. Still  
4 today, Your Honor, I do not know. And that is a serious  
5 concern under these facts.

6 THE COURT: Okay. All right, thank you.

7 MR. BREHM: Just briefly, Your Honor. First of all,  
8 I don't know about any of these allegations that weren't  
9 raised in their brief about some gang aspects, things of that  
10 nature and communicating to people outside. Again, we are--

11 THE COURT: The conversation with the mother  
12 three-waying a call is a--

13 MR. BREHM: I haven't seen any evidence about that.

14 THE DEFENDANT: She doesn't--

15 MR. BREHM: Excuse me, excuse me.

16 THE COURT: You need to talk to your counsel? Take  
17 a moment and talk to him.

18 MR. BREHM: I don't need to, Your Honor. The  
19 Government's brief, the Government's brief, that's one of the  
20 problems. They have all had all this time to lay out specific  
21 allegations about the family, and look what little that they  
22 have told this Court. Nothing of any connection--

23 THE COURT: What do I need more than the fact he is  
24 that using an attorney line in the jail with his mother's  
25 cooperation to bring in a third party who is unknown to the

1 Government?

2 MR. BREHM: Well, we contest that. We don't know  
3 what the attorney line aspect is. All I know from their  
4 allegation here is that a number was being blocked, which is  
5 apparently a number to the mother. And there was an  
6 allegation that he communicated to the mother to change the  
7 number so he could speak with her. There is no allegation in  
8 there that that contact with the mother then went on to  
9 somebody else.

10 THE COURT: He encouraged the mother to change her  
11 number so that it wouldn't be a number that was familiar to  
12 the jail and it wouldn't be blocked automatically.

13 MR. BREHM: Okay.

14 THE COURT: I understand your argument. Your motion  
15 is denied. I find that the Government has not acted  
16 arbitrarily and capriciously, nor has the jail in limiting  
17 severely, I agree with you, the contact that Mr. Mohamadi can  
18 have with the outside world.

19 It is a limitation in every respect that he has  
20 earned based on the evidence that I have reviewed to date by  
21 his continuing criminal behavior, his engagement with others,  
22 including several family members, in that unlawful conduct.  
23 And he is presently without these restrictions an extremely  
24 dangerous person to the community, including witnesses who may  
25 potentially testify against him. And that the restrictions

1 are reasonable and they don't violate his Sixth or Eighth  
2 Amendment constitutional rights.

3 Your exception is noted, Mr. Brehm.

4 MR. WALUTES: Thank you, Your Honor.

5 THE COURT: All right.

6 MR. BREHM: Your Honor, Mr. Mohamadi wants me to  
7 mention to the Court he would like to file a motion that he  
8 wants to represent himself pro se from this point on. So, we  
9 will file the necessary motion so he can address that with the  
10 Court.

11 THE COURT: Certainly, Mr. Brehm. Well, we will  
12 hear your motion on that, Mr. Mohamadi, when it is noticed. I  
13 notice there is a motion for-- Is there any objection to  
14 extending the deadline for filing of pretrial motions?

15 MR. WALUTES: Not at all, Your Honor.

16 THE COURT: Okay, I will enter that order. It may  
17 have to be further modified. But also that there is a venue  
18 motion that has been filed, and we will deal with that.

19 Mr. Mohamadi, probably the most ill-advised thing  
20 you could do would be to represent yourself in these  
21 proceedings. You have a very experienced counsel who is an  
22 extraordinary advocate, and you are not going to get any  
23 better legal representation.

24 THE DEFENDANT: Your Honor--

25 THE COURT: I am just giving you, this is a lecture,

1 and we will have a conversation next time properly after  
2 briefs have been filed.

3 THE DEFENDANT: Yes, sir.

4 THE COURT: I will hear your argument. But I am  
5 just telling you in advance, I know that you have been  
6 involved in the criminal justice system and you may have had  
7 in the past many different court-appointed counsel and you may  
8 not have been happy with them. You are now in a system where  
9 the Federal Public Defender service has the best advocates in  
10 Virginia here working on behalf of defendants. And you are  
11 going to be well served in having representation, and poorly  
12 served in representing yourself.

13 So, I want you to think about that before filing  
14 your motion. All right.

15 THE DEFENDANT: How can we argue when this guy is  
16 just making broad allegations that he bases off of--

17 THE COURT: But I have ruled. Mr. Brehm has filed a  
18 motion. It is an excellent motion--

19 THE DEFENDANT: He is just making broad accusations  
20 without giving me an opportunity to defend myself against  
21 them. He has already tainted everyone's minds, your mind with  
22 all these broad accusations and statements that he just put  
23 together with him, Mr. Burnham and Ms. Castro orchestrating  
24 this whole case from the jail.

25 THE COURT: Okay. And that will--



1           THE DEFENDANT: And all this stuff, I haven't  
2 threatened anyone. I haven't harmed anyone. No has been  
3 physically harmed, no one has even received a physical threat  
4 from me in any shape, way, form or fashion. All I have been  
5 trying to do is defend myself.

6           THE COURT: I understand that.

7           THE DEFENDANT: And the only limited-- My mother  
8 doesn't even know how to make a three-way call.

9           THE COURT: Okay, we're done.

10          THE DEFENDANT: That's all I am saying. I don't  
11 understand, there is no proof behind 80 percent of this  
12 stuff--

13          THE COURT: They represent that they have the--

14          THE DEFENDANT: He has got one jailhouse  
15 conversation--

16          THE COURT: All right, you're done, we're done for  
17 today. I have made my ruling and we are done for today.

18          THE DEFENDANT: I apologize if I am being rude.

19          THE COURT: No, I understand.

20          THE DEFENDANT: I am just disturbed about this  
21 whole--

22          THE COURT: Your freedom is at stake and I  
23 understand why you are emotional about it.

24          THE DEFENDANT: I just want you to understand, if I  
25 had actually done something--

1 THE COURT: I understand.

2 THE DEFENDANT: It is just a little outrageous.

3 MR. BREHM: Thank you, Your Honor.

4 THE COURT: Yes, Mr. Brehm, thank you.

5 -----  
HEARING CONCLUDED

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20 I certify that the foregoing is a true and  
21 accurate transcription of my stenographic notes.

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23

24 /s/  
Norman B. Linnell, RPR, CM, VCE, FCRR

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